

11-1430(L)
Kimber v. Tallon

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of February, two thousand fourteen.

PRESENT: DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

- - - - -X
KEVIN KIMBER,
Plaintiff-Appellant,

-v.-

11-1430(L)
11-1554(Con)

KEITH TALLON, Superintendent, Southern State Correctional Facility, individually and in his official capacity, CELESTE GIRRELL, Superintendent, Northern State Correctional Facility, individually and in her official capacity, ROBERT HOFMANN, JOHN GORCZYK, KATHLEEN LANMAN, MICHAEL O'MALLEY, ANITA CARBONELL, STUART GLADDING, DANIEL FLORENTINE, RAYMOND FLUM, CAROL

1 CALLEA, ANDREW PALLITO, Commissioner,
2 Vermont Department of Corrections,
3 individually and in his official
4 capacity,

5 Defendants-Appellees,

6
7 JACOB SEXTON, and all other inmates
8 similarly situated, RICHARD PAHL, and
9 all others similarly situated, JOSE
10 TORRES, and all others similarly
11 situated, DANIEL MUIR, and all others
12 similarly situated, JAMES ANDERSON,
13 and all others similarly situated,
14 DAVID MCGEE, and all other inmates
15 similarly situated,

16 Plaintiffs.

17 - - - - -X

18
19 **FOR APPELLANT:** TIMOTHY W. HOOVER (William J.
20 Simon, on the brief), Phillips
21 Lytle LLP, Buffalo, New York.

22
23 **FOR APPELLEES:** DAVID MCLEAN, on behalf of
24 William H. Sorrell, Attorney
25 General for the State of
26 Vermont, Waterbury, Vermont.

27
28 Appeal from a judgment of the United States District
29 Court for the District of Vermont (Murtha, J.).

30
31 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
32 **AND DECREED** that the judgment of the district court be
33 **VACATED AND REMANDED.**

34
35 Kimber, on behalf of a class of Vermont prisoners,
36 appeals from the judgment of the United States District
37 Court for the District of Vermont (Murtha, J.), granting
38 summary judgment dismissing his claim that 24-hour security
39 lighting in the cells violates the Eighth Amendment's
40 prohibition against cruel and unusual treatment. The

1 district court appointed the Prisoner Rights Office ("PRO")
2 of the Vermont Defender General to serve as class counsel.
3 Kimber, as a class representative, argues here (and in the
4 district court) that the PRO's performance was deficient.
5 We assume the parties' familiarity with the underlying
6 facts, the procedural history, and the issues presented for
7 review.

8 The state contests Kimber's standing to represent the
9 class in this appeal because he is pro se and unable to
10 understand the complex issues in the case. Generally, it is
11 inappropriate for a pro se litigant to represent the
12 interests of a class. See, e.g., Hagan v. Rogers, 570 F.3d
13 146, 158-59 (3d Cir. 2009). However, Kimber appears before
14 us with counsel. The consequences of disallowing Kimber
15 from challenging the PRO's representation are also troubling
16 when the class counsel has abandoned any appeal and the
17 class consists of inmates who may otherwise have trouble
18 retaining counsel. We conclude Kimber has standing to raise
19 the issues before us.

20 The state also argues that Kimber's appeal was mooted
21 when he was released from incarceration. While release
22 might moot Kimber's individual claim for injunctive relief,
23 his release did not occur until after the class was
24 certified, and "class certification will preserve an

1 otherwise moot claim." Comer v. Cisneros, 37 F.3d 775, 798
2 (2d Cir. 1994). The state contends that the district court
3 erred in the initial certification of the class, since not
4 all of the named plaintiffs were subjected to 24-hour
5 security lighting at the time of certification. The
6 district court properly concluded, however, that the
7 prisoners' claims are "inherently transitory," such that the
8 class certification relates back to the filing of the
9 complaint. See Amador v. Andrews, 655 F.3d 89, 100-01 (2d
10 Cir. 2011); see also Muhammad v. N.Y.C. Dep't of Corr., 126
11 F.3d 119, 123 (2d Cir. 1997) (noting, in a prison conditions
12 case, that there is an exception to the mootness doctrine
13 "generally invoked to preserve a class action in which some
14 members of the class retain a cognizable interest in the
15 outcome after the claim of the named representative has
16 become moot"). As a result, the class claim is not moot.

17 We review a district court's appointment and
18 supervision of class counsel for abuse of discretion. See
19 Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072,
20 1078-79 (2d Cir. 1995); Foe v. Cuomo, 892 F.2d 196, 198 (2d
21 Cir. 1989) ("[T]he question of whether the district judge
22 abused his discretion in supervising the counsel before him
23 must be considered in light of the judge's obligation to
24 insure that the plaintiff class is adequately represented

1 throughout the litigation."). In appointing the PRO, the
2 district court failed to address the mandatory factors set
3 forth in Fed. R. Civ. P. 23(g). The court therefore did not
4 consider the PRO's inexperience litigating class actions or
5 under the Federal Rules of Civil Procedure more generally
6 (such as discovery requirements). Moreover, the court was
7 aware at the time of appointment--and throughout the
8 litigation below--that the PRO lacked the resources
9 necessary to litigate this case properly. The PRO's
10 deficiencies as class counsel became more apparent as it
11 blew through filing deadlines, requested numerous filing
12 extensions, and failed to communicate with the named
13 plaintiffs.

14 The PRO generously volunteered to take on this case
15 after the earlier withdrawal of two other attorneys.
16 However, its lack of resources and its inexperience in
17 federal class actions are significant considerations. We
18 recognize that the district court had few options, or none,
19 but we must conclude that it abused its discretion in
20 appointing and retaining the PRO as class counsel. We,
21 therefore, vacate the judgment of the district court. On
22 remand, the district court will consider an appropriate way
23 forward. The law of the case doctrine does not foreclose
24 any option to achieve this goal--including decertification

of the class or appointing new class counsel for the
currently certified class.¹

For the foregoing reasons, we hereby **VACATE AND REMAND**
the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK


Catherine O'Hagan Wolfe

¹ We note that appointed counsel for appellants
argument a willingness to
e the representation if this
's grant of summary
his to the district court to

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit


Catherine O'Hagan Wolfe